Supreme Court, U.S.
FILED
DEC 29 2003
OFFICE OF THE CLERK

No. 02-1606

IN THE

Supreme Court of the United States

TENNESSEE STUDENT ASSISTANCE CORPORATION,

Petitioner,

v.

PAMELA L. HOOD,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 1,200 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year. NACBA is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. NACBA has filed *amicus curiae* briefs in various appellate courts seeking to protect the rights of consumer bankruptcy debtors, including briefs filed in this Court. *See, e.g., Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998).

The NACBA membership has a vital interest in the outcome of this appeal. NACBA members primarily represent individual low- and moderate-income wage-earners. These debtors and their families have a great need to know that they can determine the scope of their bankruptcy discharges within the ambit of their bankruptcy cases and obtain, as Congress intended, speedy, inexpensive, and effective enforcement of their federal bankruptcy rights from the federal bankruptcy court. They simply do not have the funds to pay for

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[1] All parties to this case have consented to the filing of this brief, and letters indicating consent have been submitted contemporaneously. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, their counsel, or their members made a monetary contribution to the preparation of this brief.

litigation in courts other than the court in which they have already filed a bankruptcy case.

Additionally, NACBA is gravely concerned about the potential for the effective loss of discharge rights by consumer debtors. If a state is permitted to avoid litigation during the bankruptcy case and proceed in violation of a debtor's discharge in another court or by using extra-judicial administrative collection procedures, debtors could lose valuable rights simply because they are no longer able to obtain representation. After the conclusion of the bankruptcy case, when consumer debtors are no loner represented by their bankruptcy attorneys, many debtors do not understand the significance of post-bankruptcy court or administrative actions against them, or the fact that they must reassert their bankruptcy rights, or even exactly what those rights are.

Most importantly, NACBA believes it is important to preserve the principle that states, like other governmental entities, are bound by the bankruptcy laws and should not be able to ignore them. Even if this Court concludes that a state's immunity from suit on sovereignty grounds places limitations on retrospective relief for state violations of the Bankruptcy Code, those limitations should not be expanded into a new and unfounded doctrine that would also prevent the prospective relief which has long been available under principles established by this Court.

SUMMARY OF ARGUMENT

By asserting immunity from suit based on state sovereignty grounds, the Petitioner seeks to shield itself from a bankruptcy court determination that the Respondent's student loan is subject to discharge. The Petitioner suggests that abrogation is unnecessary because student loan bankruptcy dischargeability can be raised as a defense in some future state-initiated collection action. However, it is the experience of NACBA members that student loan guaranty agencies rarely file court collection actions. This is because guaranty agencies are armed with extra-judicial collection tools that are as effective, if not more effective, than traditional state court collection remedies.

Unlike ordinary creditors, guaranty agencies can garnish wages, intercept tax refunds and seize retirement or other government benefits without bringing a court action, and can do so unhampered by state exemption laws, statutes of limitation, or other state and federal law collection restrictions. Importantly, a guaranty agency that is determined to avoid an undue hardship dischargeability determination after a debtor has filed bankruptcy can simply elect not to bring a state court action and instead rely exclusively upon non-judicial collection procedures. And the extra-judicial collection procedures used by guaranty agencies do not afford bankruptcy debtors a meaningful opportunity to obtain a dischargeability determination or otherwise enforce federal bankruptcy law. Thus, the inability of debtors to obtain a timely bankruptcy court dischargeability ruling would effectively mean that the Bankruptcy Code right to a student loan hardship discharge will exist without a remedy.

The entire bankruptcy jurisdictional scheme evidences Congressional intent that all matters related

to the bankruptcy case be decided expeditiously and inexpensively in the federal bankruptcy courts. Consumer bankruptcy debtors simply do not have the resources to litigate in multiple courts or administrative agencies to protect their rights, and requiring them to do so would cause the effective loss of the rights Congress intended them to have. Moreover, a contemporaneous determination of student loan dischargeability is necessary for the proper administration of the bankruptcy case itself. Since debtors often have student loan obligations owing to more than one lender or state guaranty agency, or they may have taxes and other obligations owing to different states, a central forum such as the bankruptcy court must be available for resolution of all debts of the debtor in order to avoid inconsistent and inequitable results.

Finally, regardless of the outcome of the abrogation issue in this case, *amicus* requests that this Court ensure that debtors retain an effective remedy to enforce federal bankruptcy law. In recent opinions, this Court has reaffirmed the vitality of the *Ex Parte Young* doctrine, which permits suits for prospective declaratory and injunctive relief against state officers to prevent them from violating federal law. This doctrine remains an important tool for vindicating the Supremacy Clause's dictates that state officials are bound by federal law. *Amicus* urges this Court to broadly reaffirm the use of the *Young* doctrine generally in bankruptcy cases and specifically in proceedings brought to enforce the right to a student loan discharge under § 523(a)(8).

ARGUMENT

I. BARRING BANKRUPTCY COURTS FROM MAKING UNDUE HARDSHIP DETERMINATIONS WILL LEAVE STUDENT LOAN DEBTORS WITHOUT AN EFFECTIVE REMEDY.

Student loan debts are often excepted from the discharge that an individual debtor obtains upon completion of a bankruptcy case. Congress has provided, however, that the discharge shall apply to student loan obligations that impose an undue hardship on the debtor and the debtor's dependents. The Petitioner contends that barring debtors from obtaining an undue hardship determination during a bankruptcy case will not prejudice debtors as they can seek compliance with federal bankruptcy law when sued in state court. The Petitioner disingenuously describes this opportunity to obtain an undue hardship determination in some future state court collection action as an "appropriate and fully adequate remedy." (Petitioner's Brief, p. 30). On the contrary, because of the unique way in which student loans are collected through the use of extra-judicial procedures, barring debtors from obtaining a timely bankruptcy court ruling on undue hardship will effectively mean that this right exists without a remedy.

Student loan guaranty agencies such as the Petitioner in this case serve as "intermediaries for the federal government." *Student Loan Marketing Ass'n. v. Riley*, 104 F.3d 397, 400 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 913 (1997). Although the federal government is the ultimate guarantor of student loans, state guaranty agencies initially carry out that role by entering into guaranty agreements with private lenders who originate student loans. If a student loan goes into default, the guaranty agency will in the first instance reimburse the lender. 20 U.S.C. § 1075(b).

If the guaranty agency is then unable to collect on the debt, it may file a claim with the Department of Education for reimbursement. 20 U.S.C. § 1078(c). However, the ability of a guaranty agency to obtain federal interest payments and reimbursement under the federal guarantee is "contingent on compliance with elaborate procedures that control every aspect of the loan, from the initial explanation to the borrower to the dunning methods employed if the loan falls delinquent." *Student Loan Marketing Ass'n. v. Riley*, 104 F.3d at 400; *see also* 20 U.S.C. § 1080. Importantly, these procedures virtually always permit the guaranty agency to collect student loans without resort to the court system.

A. State Guaranty Agencies Need Not Rely Upon Conventional Collection Methods And Consequently Rarely File State Court Actions To Collect Student Loans.

In recognition that guaranty agencies serve as a proxy for the federal government in collecting loans that ultimately are debts to the federal government, Congress ceded to guaranty agencies the unusual power to use extra-judicial means to collect student loans.[2] Such authority outside of the student loan area is generally held only by the federal government and its agencies, and is not available to a guaranty

[2] A guaranty agency must deposit virtually all payments and earnings arising from its guaranty program into a reserve fund. 34 C.F.R. § 682.410(b)(1). The assets that comprise the reserve fund of a guaranty agency, and any assets purchased with such funds, are deemed to be the property of the United States. 20 U.S.C. § 1072(g). For this reason, the Department of Education considers guaranty agencies to be fiduciaries to the Department in administering reserve funds. *See* 61 Fed. Reg. 49382 (Sept. 19, 1996)("...guaranty agency's role is best characterized as that of a trustee holding money for the benefit of another.").

agency under state law. The Department of Education regulations strongly encourage guaranty agencies to collect student loans using these extra-judicial procedures, and in fact effectively relegate court actions to the status of a collection procedure of last resort.

A guaranty agency must engage in collection activities on a student loan that is in default after it has paid a default claim to the lender. 34 C.F.R. § 682.410(b)(6)(i). The Higher Education Act and the Department of Education's regulations equip the guaranty agency with three primary collection tools that do not involve the filing of a court action: the agency may initiate proceedings to effect an administrative wage garnishment, to intercept a federal tax refund, and to offset payments or benefits by the federal government to the borrower.

1. Administrative Wage Garnishment. The Higher Education Act authorizes the Department of Education and guaranty agencies to garnish student loan borrowers' wages without obtaining a court order or otherwise initiating a court proceeding. 20 U.S.C. § 1095a. The guaranty agency may garnish up to 10 percent of a student loan borrower's "disposable pay."[3] 20 U.S.C. § 1095a; 34 C.F.R. § 682.410(b)(9)(i)(A). Student loan garnishments by guaranty agencies may proceed even in states that prohibit wage garnishments or restrict their use under applicable state law. 20 U.S.C. § 1095a(a)(student loan garnishment requirements are allowed "notwithstanding any provisions of State law"); 34 C.F.R. § 682.410(b)(8)(regulatory provisions permitting non-judicial procedures preempt state law).

[3] Disposable pay is defined as pay "remaining after the deduction of any amounts required by law to be withheld." 20 U.S.C. § 1095a(e); 34 C.F.R. § 682.410(b)(9)(i)(A).

Guaranty agencies are required to initiate administrative wage garnishments against all eligible student loan borrowers. 34 C.F.R. § 682.410(b)(6)(iii). The only exception to this requirement arises if the agency determines that the borrower has no wages that can be garnished or the agency determines that the borrower has sufficient attachable assets or income that is not subject to administrative wage garnishment, and that the use of litigation would in this event be more effective in collecting the debt. 34 C.F.R. § 682.410(b)(6)(iv).

2. Tax Intercept. State guaranty agencies are also granted the right to collect student loan debts by using the federal tax intercept program. Federal law requires a tax refund intercept when a debt is owed to a federal agency, including a debt administered by a third party acting as an agent for the federal government. 31 U.S.C. § 3720A(a). The Department of Education delegates to guaranty agencies the authority to initiate intercepts for loans held by the guaranty agency.[4] State guaranty agencies must attempt to intercept tax refunds each year that the loan remains in default. 34 C.F.R. § 682.410(b)(6)(ii).

As under the administrative wage garnishment procedure, state laws that could conceivably limit application of the tax intercept program, such as state exemption laws, are preempted. *See Bosarge v. U.S. Dept. of Education*, 5 F.3d 1414 (11th Cir. 1993), *cert. denied*, 512 U.S. 1226 (1994). All federal tax refunds are subject to intercept, including a refund payable to

[4] Prior to a legislative change in 1992 allowing interception of debts owed to agents of the federal government, authorization to intercept student loans held by guaranty agencies was accomplished by the guarantors assigning the loans to the United States prior to interception. *See* subsec (a), Pub. L. 102-589, § 3(1).

a low-income borrower under the Earned Income Tax Credit program. *Bosarge*, 5 F.3d at 1420.

3. Administrative Benefit Offset. In 1996, Congress further strengthened the debt collection powers of federal agencies through enactment of the Debt Collection Improvement Act. Federal government agencies were given the authority to offset formerly exempt federal benefits to collect debts owed to the government, such as student loans. 31 U.S.C. § 3716. The statute authorizes offset of federal benefits payable to a student loan borrower such as those provided under the Social Security Act, the Black Lung Benefit Act and the Railroad Retirement Benefits Act. 31 U.S.C. § 3716(c)(3)(A)(ii).[5] State guaranty agencies are required to attempt an annual federal benefit offset. 34 C.F.R. § 682.410(b)(6)(ii).

Given the breadth of these extra-judicial collection procedures, state guaranty agencies are not likely to file state court collection actions against bankruptcy debtors, nor are they required or encouraged to do so by the Department of Education. Moreover, the effectiveness of these procedures is greatly enhanced by their operation free from state law restrictions, including statutes of limitation. *See* 20 U.S.C. § 1091a (a)("... no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by - ... a guaranty agency....").
Unlike a private creditor who must timely bring a court action or forever forfeit the right to sue, a guaranty agency may take advantage of non-judicial collection procedures throughout the borrower's life

[5] The amount of the offset is set at the lesser of 1) the amount of the debt; 2) an amount equal to 15% of the monthly benefit payment; or 3) the amount, if any, by which the monthly benefit exceeds $750. 31 C.F.R. § 285.4(e).

and still always retain the right to initiate or threaten a court action.

The broader scope of these administrative procedures also creates an incentive for guaranty agencies to avoid state court collection actions. If a guaranty agency obtains a state court judgment against a borrower, it would be required to comply with state and federal exemption schemes and post-judgment enforcement procedures. For example, a court judgment could not be enforced by garnishing or seizing a borrower's Social Security benefits (42 U.S.C. § 407), but these same benefits would be subject to offset under the administrative procedures.

Thus, a guaranty agency that has blocked on sovereign immunity grounds any attempt by the debtor to have an undue hardship discharge determination made during a bankruptcy proceeding, and that is determined to keep the dischargeability issue unresolved by avoiding any court rulings, can simply elect not to file a court action and instead rely upon the extra-judicial procedures. In this situation, the debtor would also be precluded from initiating a state court action against the state itself seeking compliance with federal law as the state can continue to assert its immunity from suit in the state action. *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999).

B. The Extra-Judicial Debt Collection Procedures Used By Student Loan Guaranty Agencies Do Not Afford Bankruptcy Debtors A Meaningful Opportunity To Enforce Federal Bankruptcy Law.

The non-judicial wage garnishment and intercept procedures implemented by the Department of Education in collecting student loans provide that state guaranty agencies shall conduct a pre-seizure hearing if the borrower contests the validity of the debt. However, the procedures do not contemplate that a borrower may obtain a bankruptcy undue hardship determination at such a hearing. More importantly, the hearing procedures are inadequate when viewed in relation to the heavy burden imposed on student debtors in establishing undue hardship under § 523(a)(8). The procedures also fail to expressly provide for an opportunity for judicial review.

Before an administrative garnishment may proceed, the borrower must be provided notice of the right to a hearing to contest the existence or amount of the student loan debt. 20 U.S.C. § 1095a(a)(5); 34 C.F.R. § 682.410(b)(9)(i)(E).[6] The Department of Education issues sample notices and request for hearing forms used by guaranty agencies that specify possible grounds for contesting the obligation.[7] One of

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[6] If a borrower requests a hearing, an official appointed by the guaranty agency will conduct the hearing. The hearing official may be any qualified individual, including an employee of the guaranty agency, who is not under the supervision or control of the head of the agency. 34 C.F.R. § 682.410(b)(9)(i)(M).

[7] For example, a Request for Hearing form that may be submitted directly to the Department is available on the Department's website at: http://www.ed.gov/offices/OSFAP/DCS/forms/Request.For.Hearing.pdf. Similar forms are used by guaranty agencies.

the grounds listed on the hearing request form is that a bankruptcy proceeding is pending, reflecting the Department's recognition that the automatic stay applies during the bankruptcy to the administrative garnishment and offset procedures.

The other bankruptcy specific ground that may be asserted is that the "debt was discharged in bankruptcy." *See* DOE "Request for Hearing" form.[8] Given that the Department's regulations provide no guidance to guaranty agency hearing officers on how to apply the undue hardship discharge standard found in § 523(a)(8), this appears simply to require that the hearing officer accept as a defense a prior bankruptcy court order that the loan was discharged based on undue hardship (or that the debt was discharged under the seven-year rule contained in former § 523(a)(8)(A) for bankruptcy cases filed before October 7, 1998).[9]

Even if the bankruptcy undue hardship discharge issue could be raised in an administrative garnishment hearing,[10] the procedures used for such

[8] *See also,* Department of Educations's description of the administrative wage garnishment procedure available on its website at: http://www.ed.gov/offices/OSFAP/DCS/awg.html.

[9] In instructions and supporting materials that the Department supplies to its authorized collection representatives, a sample letter to a borrower who requests a hearing based on a claim that the debt was discharged in bankruptcy, but who fails to submit documentary evidence, states that the borrower should submit the following as one form of acceptable documentation: "Court order that debt is Dischargeable on grounds of undue hardship." *See* DOE website, http://www.collections.sfa.ed.gov/contractors/pcanew/awg/AWG_Hearings_Process.doc.

[10] In the case of state courts, the grant of concurrent jurisdiction with bankruptcy courts to make dischargeability and automatic stay determinations is found in 28 U.S.C. § 1334(b). This Court has stated, however, that § 1334(b) does not grant such jurisdiction upon administrative agencies: "Section 1334(b) concerns the allocation of jurisdiction between bankruptcy courts and other 'courts,' and, of course, an administrative agency such as the Board is not a 'court.'" *Board of Governors v. MCorp Financial, Inc.*, 502 U.S. 32, 41-42, 116 L.Ed 2d 358, 368 (1991). *See also, Sunrise Development, Inc. v. FDIC*, 33 F.3d 106 (1st Cir. 1994); *San Rafael Baking Co. v. Northern Calif. Bakery Drivers Sec. Fund*, 219 B.R. 860 (B.A.P. 9th Cir. 1998).

hearings preclude any meaningful opportunity for the matter to be properly adjudicated. The state guaranty agency may provide an oral or written hearing. 34 C.F.R. § 682.410(b)(9)(i)(J). If an oral hearing is provided, it may be conducted either in-person at a location selected by the guaranty agency or by telephone conference. *Id.* There is no requirement that an in-person hearing be held in a location convenient to the debtor.[11] The guaranty agency is also not required to record or maintain a transcript of the proceedings. *See* 59 Fed. Reg. 22,474, 22,475, Comment 75 (Apr. 29, 1994).

In the case of a tax intercept or administrative offset, a borrower seeking an oral hearing must submit with the hearing request a statement of the reasons why the review should not be limited to a review of the documentary evidence without an evidentiary hearing. 34 C.F.R. §§ 30.25 and 30.33.[12] If an oral hearing is granted, it is not a formal

[11] Although an administrative hearing may be held thousands of miles away from the debtor's residence, a state court collection action filed by a guaranty agency through its attorney would be required to be brought in the judicial district in which the debtor resides at the time the action is commenced. *See* 15 U.S.C. § 1692i.

[12] The borrower must also submit a list of the witnesses the borrower wishes to call, the issues they will testify about, and the reasons why the testimony is necessary. 34 C.F.R. § 30.25. The Department's regulations establish standards about when an oral hearing will be granted. 34 C.F.R. § 30.26.

evidentiary hearing subject to the Administrative Procedure Act, 5 U.S.C. § 554. 34 C.F.R. § 30.26.

Finally, under the federal collection regime, guaranty agencies are delegated the authority to adjudicate collection disputes and make binding decisions. *See, e.g.*, 20 U.S.C. § 1095a(b). However, unlike federal agency hearings or proceedings before the bankruptcy court, borrowers have no explicit right to judicial review of guaranty agency decisions. A hearing conducted by a state guaranty agency, although required by federal law, is not subject to the federal Administrative Procedure Act. [13] And whether such opportunity for review exists under state law, and the extent of such review, may depend upon on whether the guaranty agency is a governmental unit subject to state administrative procedures law.

[13] A borrower aggrieved by a guaranty agency decision may also not have a right for review by the Department of Education. With regard to administrative wage garnishments, the Department of Education has not expressly provided for this direct right of review and has stated that it "does not intend to second-guess an agency's decisions about wage garnishments on a case-by-case basis." 59 Fed. Reg. 22,474, 22,475, Comment 75 (Apr. 29, 1994). Nevertheless, the Department has indicated that it will "take appropriate action" if a guaranty agency fails to follow the Department's procedures and regulations. *Id.* The Department's tax intercept regulations permit a debtor to seek review by the Department of a guaranty agency decision. 34 C.F.R. § 30.33 (d)(3).

C. Unlike Guaranty Agencies And State Courts, Federal Bankruptcy Courts Are Uniquely Positioned And Qualified To Make Student Loan Dischargeability Determinations.

A fundamental goal of bankruptcy is that a debtor's financial matters should be resolved expeditiously and economically in a single forum. *Katchen v. Landy*, 382 U.S. 323, 328-329, 86 S.Ct. 467, 472, 15 L. Ed. 2d 391 (1966)("chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration of the estate of all bankrupts within a limited period.'"), *quoting Ex Parte Christy*, 3 How. 292, 312, 11 L.Ed. 603.[14]

The inability of a debtor to obtain a timely discharge determination can significantly impact the bankruptcy proceeding itself. Contrary to the Petitioner's assertion that a student loan dischargeabiltiy determination is "unrelated to any issues such as the distribution of assets of the bankrupt estate" (Petitioner's Brief at p. 30), the prompt resolution of the dischargeability issue in chapter 13 cases affects not only the debtor but all creditors, including other state creditors. A debtor may owe student loans to more than one state guaranty agency, as well as taxes and other obligations to different states. The bankruptcy process ensures that there will be equitable treatment of such creditors as part of the plan confirmation process. *See* 11 U.S.C. §§ 1322(b)(2) and 1322(b)(5).

[14] Rule 1001 of the Federal Rules of Bankruptcy Procedure states that "[t]hese rules shall be construed to secure the just, speedy and inexpensive determination of every case and proceeding." Citing this Court's opinion in *Katchen v. Landy*, 382 U.S. 323 (1966), the Advisory Committee note indicates that "[t]he objective of 'expeditious and economical administration' of cases under the Code has frequently been recognized by the courts to be 'a chief purpose of the bankruptcy laws.'"

In addition, the needed contemporaneous dischargeability determination of the debtor's student loan obligations can have a profound impact on the formulation and confirmation of the debtor's chapter 13 plan. For example, if the debt is subject to the undue hardship discharge, the debt will be paid like other unsecured debts based on a pro rata distribution. *See* 11 U.S.C. § 1322. On the other hand, if the debt is declared to be nondischargeable, the debtor may seek to pay the student loan obligation pursuant to 11 U.S.C. § 1322(b)(5).[15] *See, e.g., In re Williams*, 253 B.R. 220 (Bankr. W.D. Tenn. 2000); *In re Chandler*, 210 B.R. 898 (Bankr. D.N.H. 1997); *In re Benner*, 156 B.R. 631 (Bankr. D. Minn. 1993); *In re Saulter*, 133 B.R. 148 (Bankr. W.D. Mo. 1991). The debtor may also propose to separately classify student loan obligations and provide for their favored treatment under the plan, *e.g., In re Cox*, 186 B.R. 744 (Bankr. N.D. Fla. 1995); *In re Tucker*, 159 B.R. 325 (Bankr. D. Mont. 1993), *but see In re Bentley*, 266 B.R. 229 (B.A.P. 1st Cir. 2001), or establish a five-year plan in which the student loans are not separately classified for the first three years of the plan but then are provided greater payment during the plan's final two years, *e.g., In re Simmons*, 288 B.R. 737 (Bankr.D.N.D. Tex. 2003); *In re Strickland*, 181 B.R. 598 (Bankr. N.D. Ala. 1995).

Since debtors often have student loan obligations owing to more than one lender or state guaranty agency, it is also necessary, in order to avoid inconsistent results, that a central forum such as the bankruptcy court be available for resolution of all debts of the debtor. *In re Schmitt*, 220 B.R. 68, 74

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[15] Section 1322(b)(5) permits the curing of defaults under the plan and maintenance of ongoing payments, typically made outside the plan, on any secured or unsecured claims where the last payment on the debt is due after the final payment under the plan.

(Bankr. W.D. Mo. 1998)("The risk of inconsistent determinations by the state courts as to dischargeability, or as to the restructuring of obligations due those states, is obvious."). In some cases, bankruptcy courts have determined, for example, that a debtor owing $60,000 in student loans may have the ability to repay $20,000, but excepting the $40,000 balance from discharge would impose an undue hardship. *See, e.g., In re Hornsby*, 144 F.3d 433 (6th Cir. 1998)(partial discharge is permitted under bankruptcy court's equitable powers); *In re Andresen*, 232 B.R. 127 (B.A.P. 8th Cir. 1999) (affirming bankruptcy court's discharge of two of three loans); *In re Myers*, 280 B.R. 416 (Bankr.S.D.Ohio 2002)(three loans totaling $59,438 discharged and three smaller loans totaling $5,472 found nondischargeable); *In re Morris*, 277 B.R. 910 (Bankr.W.D.Ark. 2002) (largest student loan in amount of $65,912 discharged but not smaller loans totaling $41,741).

An individual student loan debt viewed in isolation in a state court action may not properly convey to the court the hardship a debtor may experience in having the debt excepted from discharge. *See In re Grigas*, 252 B.R. 866 (Bankr. D.N.H. 2000) (based on court's finding that debtor could pay $224 per month for 15 years, debtor's 15 student loans should be analyzed in chronological order so that only those that can first be fully repaid within 15 years will be excepted from discharge); *In re Hinkle*, 200 B.R. 690 (Bankr. W.D. Wash. 1996) (first three loans totaling $10,104 can be repaid by debtor but repayment of remaining three loans totaling $18,143.71 constitutes an undue hardship).

A guaranty agency hearing officer, even if he or she had authority to adjudicate a bankruptcy undue hardship discharge claim, would not consider debts

owing to other guaranty agencies or have any reason to apply an equitable allocation scheme. Similarly, a debtor sued in a state court action on one of several separate loans would be precluded from seeking an undue hardship discharge ruling from that court as to any loans held by other agencies as the state court would likely lack jurisdiction over foreign guaranty agencies and these agencies would in any event claim immunity from suit. The piecemeal and ad hoc method of dischargebility determinations suggested by the Petitioner, assuming the availability of state court venues actually were to materialize for the debtor, would not only produce inconsistent results but would force the debtor to incur excessive litigation costs in seeking to prove undue hardship in multiple forums.

There are other risks that the debtor faces in being precluded from obtaining a timely dischargeability ruling. Some courts have held that undue hardship should be determined at or near the time of the bankruptcy filing. *See In re Bugos*, 288 B.R. 435 (Bankr.E.D.Va. 2003); *In re Kapsin*, 265 B.R. 778 (Bankr.N.D.Ohio May 29, 2001). If the debtor must wait until he or she is sued, or some other opportunity for a hearing, the adjudicator could find that the debtor's dischargeability defense is stale or that the debtor's current situation is irrelevant.

The Petitioner also contends that application of the undue hardship standard contained in § 523(a)(8) is "not peculiarly a bankruptcy issue." (Petitioner's Brief, p. 29). On the contrary, while state courts regularly make determinations about the validity and amount of debts, they are not accustomed to making determinations about whether a debtor may discharge a debt, let alone whether such debt should be discharged based on federal bankruptcy law. In addition, there is a well-developed body of federal decisional law that has interpreted the statutory

language in § 523(a)(8), and virtually all of the Circuit Courts have adopted a variant of an undue hardship test to be applied in such cases.[16] These tests not only lend predictability to a bankruptcy discharge-ability proceeding but also permit a debtor to efficiently and economically prepare for trial.

Moreover, because these undue hardship tests generally require that the bankruptcy court consider not only the debt in question but all of the debtor's financial circumstances, including other debts, available assets, and income and expenses, bankruptcy courts are particularly well-suited for making such determinations as a result of the extensive financial information that is provided to the court as part of the bankruptcy schedules and other required filings. *See In re Snyder*, 228 B.R. 712, 719 (Bankr.D.Neb. 1998)("Removing isolated issues of discharge to state court from the context of a larger bankruptcy proceeding in bankruptcy court removes the ability of a bankruptcy court to review a debtor's entire financial picture and to ensure an equitable result for both the debtor and all creditors.").

The uncertainty and lack of finality as to the scope of the discharge additionally subjects the debtor to increased financial risk in the event that the debt is later determined to be nondischargeable. Since the debtor would have no way to know the effect of the bankruptcy, a debtor in default would be subjected to continuing post-bankruptcy interest charges and substantial collection fees and costs while waiting to

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[16] *E.g., In re Ekenasi*, 325 F.3d 541 (4th Cir. 2003); *Long v. Educ. Credit Mgmt. Corp.*, 322 F.3d 549 (8th Cir. 2003); *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773 (7th Cir. 2002); *In re Brightful*, 267 F.3d 324 (3rd Cir. 2001); *In re Rifino*, 245 F.3d 1083 (9th Cir. 2001), *cert. denied sub nom., Nowland v. U.S.*, 534 U.S. 927 (2001); *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).

obtain a dischargeability ruling sometime in the future when a collection action is taken.[17] Rather than risk incurring such fees and permitting the loan amount to escalate unchecked, many debtors will simply abandon their right to an undue hardship discharge. For debtors who meet the dischargeability requirements set out in § 523(a)(8), this will result in a serious erosion of their fresh start opportunity. *Grogan v. Garner*, 110 U.S. 1945, 111 S.Ct. 654, 659, 109 L. Ed. 2d 308 (1991)("a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'"), *quoting Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934).

D. Federal And State Repayment And Discharge Options Are Not A Substitute For A Bankruptcy Undue Hardship Discharge.

Amici Council of State Governments contend that abrogation of state immunity is unnecessary in this case because debtors who are having difficulty paying their student loans can obtain relief under the Department of Education's payment programs. *See Amici* Council's brief, pp. 27-29. As examples, *Amici* refer to the Department's regulations which permit the

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[17] Whether or not provided for in the borrower's promissory note, the Department of Education regulations require that a guaranty agency charge the borrower for collection costs on a loan in which it is has paid a default or bankruptcy claim. 34 C.F.R. § 682.410(b)(2). The amount of such collection fees is generally determined by a formula set out in 34 C.F.R. § 30.60, but in no event shall the fees exceed the amount that may be charged by the Department itself. These collection fees may amount to as much as 25% of the loan obligation.

granting of a temporary deferment or forbearance under certain specified conditions.[18]

While these payment plan options can provide temporary payment relief for some borrowers, they are not a substitute for the discharge provided for in § 523(a)(8). The Bankruptcy Code undeniably provides an opportunity for a debtor to obtain an absolute and immediate discharge of student loans if the statutory conditions are met, and no comparable discharge is available under the Department's regulations and administrative collection programs. If Congress had intended for the Department's payment programs to meet all hardship situations, it would have repealed the undue hardship provisions in the Bankruptcy Code. In fact, Congress has not eliminated the bankruptcy hardship discharge despite having made amendments to § 523(a)(8) since the student loan payment programs were enacted. In this regard, one court has noted that such payment plans should not present an opportunity for courts to abdicate their obligation to apply the bankruptcy law as written. *In re Kopf*, 245 B.R. 731, 735 (Bankr. D. Me. 2000) (no matter how flexible or "humanely executed" such programs may be, they are not the equivalent of a bankruptcy discharge).[19]

Other courts have recognized that placing a debtor in an extended payment plan, such an Income

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[18] *Amici* Council also refer to the Department's regulation that authorizes the cancellation of a student loan if the debtor is found to be totally and permanently disabled. 34 C.F.R. § 682.402. However, most debtors who believe they qualify for cancellation of the debt under this provision would first apply for a disability cancellation and would only seek a bankruptcy undue hardship discharge if the Department denies the application.

[19] The *Kopf* court noted that even where a debtor's monthly payment obligation is reduced to zero under a repayment plan, this will only "postpone repayment indefinitely and, unless interest is abated, permit additional interest accruals." *Id.* at 735.

Contingent Repayment Plan,[20] that is not likely to result in the pay off of the loan, or in some cases may not even reduce the amount owed, does not mitigate the undue hardship the loan would cause. *E.g.*, *In re Ford*, 269 B.R. 673 (B.A.P. 8th Cir. 2001) (availability of Income Contingent Repayment Plan is merely one factor considered in totality of circumstances test and not determinative in case where twenty-five year Plan would result in 62-year-old woman with arthritic condition carrying large and increasing debt that would not be forgiven until she was 87 years old); *In re Cheney*, 280 B.R. 648 (N.D. Iowa 2002). Under such plans, payments must be made if the debtor's income is even slightly above poverty level. In addition, unlike a bankruptcy discharge, an Income Contingent Repayment Plan actually allows the loan balance to steadily climb due to the capitalization of interest and it does not prevent the discharge of any remaining balance after twenty-five years from being deemed taxable income to the debtor. *See* 34 C.F.R § 685.209(c)(5).

II. THE COURT'S RULING ON THE ABROGATION ISSUE SHOULD NOT ALTER A STUDENT LOAN DEBTOR'S RIGHT TO ENFORCE THE UNDUE HARDSHIP PROVISIONS OF THE BANKRUPTCY CODE BY SEEKING PROSPECTIVE RELIEF AGAINST STATE OFFICERS.

Amicus believes that the decision below was correctly decided for the reasons set forth in the Respondent's brief. In the event that the Court declines to find a valid abrogation in this case, however, *amicus* requests that this Court ensure that debtors retain an effective remedy to enforce federal

[20] *See* 20 U.S.C. §§ 1078(m) and 1087a; 34 C.F.R. § 685.209(a)(2)(i).

bankruptcy law. As the Court has done in recent cases, this can be accomplished through a reaffirmation of the vitality of the doctrine of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.714 (1908), which permits suits for prospective declaratory and injunctive relief against state officers to prevent them from violating federal law. *Alden v. Maine*, 527 U.S. 706, 756-57, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 276-77, 117 S.Ct. 2028, 2038, 138 L.Ed.2d 438 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48, 116 S.Ct. 1114, 1131 at n.16, 134 L.Ed.2d 252 (1996).

In *Coeur D'Alene*, this Court held in referring to the *Young* doctrine that "where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar," and also recognized that there exists a "presumption in favor of federal-court jurisdiction in this type of case." *Coeur d'Alene Tribe*, 521 U.S. at 276-77, 117 S.Ct at 2038. The rationale for the *Young* doctrine is that since a state cannot authorize a state official to violate the Constitution or federal laws, an action by a state official in violation of federal law is not deemed an action of the state and therefore not immune from suit under the Eleventh Amendment. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102, 104 S.Ct. 900, 909, 79 L.Ed.2d 67 (1984).

To invoke the *Young* doctrine, the party seeking enforcement of federal law must establish the following two elements. First, the party must allege that a state official is acting in violation of federal law. *See Pennhurst State School*, 465 U.S. at 106, 104 S.Ct. at 911. Second, the relief sought must be prospective in that the party must seek to enjoin future violations of federal law rather than obtain monetary

compensation or other retrospective relief for past violations. *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 425-26, 88 L.Ed.2d 371 (1985); *Quern v. Jordan*, 440 U.S. 332, 346-49, 99 S.Ct. 1139, 1147-49, 59 L.Ed.2d 358 (1979); *Edelman v. Jordan*, 415 U.S. 651, 664-71, 94 S.Ct. 1347, 1356-60, 39 L.Ed.2d 662 (1974).

A bankruptcy adversary proceeding filed against an officer of a student loan guaranty agency seeking a declaration that a student loan is dischargeable because of undue hardship involves an appropriate use of the *Young* doctrine. [21] A debtor whose student loan is dischargeable under § 523(a)(8) needs a declaration of dischargeability only because the student loan authority has refused to recognize that the debt is dischargeable. In such cases where the debtor alleges that a state officer is acting unlawfully in refusing to implement the statute, the first prong of the *Young* doctrine is satisfied. [22]

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[21] There is no doubt that the discharge itself that is entered in a bankruptcy case is binding upon the state, because the original bankruptcy case is not a suit against the state. *State of Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). *See also Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 787 (4th Cir. 1997)(bankruptcy court may confirm a plan which determines the rights of a state because jurisdiction is over debtors and estates rather than over the state). As the Fourth Circuit held in *Antonelli Creditors*, this result is a consequence of Congress' constitutionally authorized legislative power to make the federal courts the exclusive venue for administering the bankruptcy law. *Id.*

[22] Some courts have wrongly held that the *Young* doctrine is not applicable in the student loan context by suggesting that the debtor cannot allege a continuing violation of federal law before a court has declared the debt to be dischargeable. *See, e.g., In re Holland*, 230 B.R. 387 (Bankr.W.D.Mo. 1999); *In re Snyder*, 228 B.R. 712 (Bankr.D.Neb. 1998). These cases are falsely premised on a reading of § 523(a)(8) to the effect that a student loan is not dischargeable unless a court has determined that it is dischargeable. *See, e.g., In re Jane*, 251 B.R. 525 (Bankr. W.D. Mo. 2000). While student loan creditors will, as a practical matter, continue collection efforts absent such a determination, the language of § 523(a)(8) clearly provides that a loan is dischargeable if it meets the undue hardship test; it does not provide that the loan is non-dischargeable until a court finds otherwise. There is no basis for distinguishing student loans from other types of debts which in certain circumstances can be non-dischargeable, such as tax debts. Student loans are either discharged or not discharged depending solely upon whether they fit the description in § 523(a). In contrast to the dischargeability provisions listed in § 523(c), which renders certain debts dischargeable unless the bankruptcy court specifically finds otherwise, a debt is not automatically discharged or not discharged under § 523(a)(8) or the other dischargeability provisions if the bankruptcy court does not make a determination of dischargeability. *See Collier on Bankruptcy*, ¶ 4007.03, n. 4a (15th ed. rev.).

The final requirement for invoking the *Young* doctrine also applies in a student loan hardship case because the debtor is typically requesting only prospective and injunctive relief, and such relief cannot be equated with a request for retrospective damages.[23]

Cases involving student loan hardship discharge present particularly powerful reasons for

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[23] The fact that enforcing the federal bankruptcy law might affect the state treasury does not create an exception to the doctrine. *Quern v. Jordan*, 440 U.S. 332, 346 349, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979); *Edelman v. Jordan*, 415 U.S. 651, 664 671, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974). In a student loan discharge case, the fiscal impact is much less significant than in a suit for damages, especially given that the state is reimbursed based on its reinsurance agreement with the Department of Education. Upon the commencement of a bankruptcy action seeking a undue hardship declaration under § 523(a)(8), a guaranty agency initially pays a default claim to the lender but then is reimbursed by the Department for the unpaid balance of principal and interest on the student loan if the loan is discharged. 20 U.S.C. § 1087(b); 34 C.F.R. § 682.402(k). Even if a guaranty agency could show some palpable affect on the state treasury resulting from prospective enforcement of the bankruptcy discharge, such an impact would not justify the non-application of the *Young* doctrine.

application of the *Young* doctrine. The bankruptcy laws raise uniquely federal issues, due to the exclusive power in the federal government to enact "uniform bankruptcy laws" granted by the Constitution, Article I, § 8. The discharge of debts can only be provided by federal law, so the interests of state sovereignty under the Constitution with respect to that issue do not have the same weight as they might with issues of greater state concern, such as land use or social welfare.

And, far from enacting a detailed regulatory scheme for adjudication of disputes outside of the court system as in *Seminole*, Congress created the bankruptcy courts within the federal court system, clearly indicating that it expected bankruptcy disputes to be decided in federal courts. The desire to concentrate bankruptcy litigation in the federal courts was a fundamental purpose of creating the expansive jurisdiction of the bankruptcy court. *See* H.R. Rep. No. 595, 95th Cong. 1st Sess. 43-50 (1977).[24] Under Petitioner's theory, the federal courts would be powerless to enforce the bankruptcy discharge, and the uniformity envisioned by the Constitution would be lost, with bankruptcy laws subject to interpretation in the courts of the fifty states, and most likely not even there.

Moreover, there were strong policy reasons for adopting this system allowing consumer debtors to enforce their rights in the bankruptcy court. Consumer bankruptcy cases are, of necessity, low-budget affairs. The typical fee for a chapter 7 case is

[24] The jurisdictional scheme currently in place differs in some respects from that envisioned by the bill which was the subject of this report, principally in its division of jurisdiction between the bankruptcy court and the district court. However, the broad grant of jurisdiction for the federal courts to consider all matters arising in bankruptcy cases or related to bankruptcy cases remains. 28 U.S.C. § 1334.

under $1,000.00. *See In re Agnew*, 144 F.3d 1013 (7th Cir. 1998). Consumer debtors do not have the financial wherewithal to file proceedings to enforce or interpret their discharges in courts other than the bankruptcy court, a court in which they can obtain expeditious and inexpensive relief as part of the bankruptcy case they have already filed.[25] In fact, because debtors seeking to discharge student loans are normally experiencing extreme financial hardship, they are the least able to bear the costs of litigation.

It is therefore not surprising that since *Coeur d'Alene*, federal courts have continued to invoke *Ex Parte Young* to enforce the Bankruptcy Code, determine the dischargeability of debts, and enjoin violations of the bankruptcy laws by state officers. *E.g.*, *In re Ellett*, 254 F.3d 1135 (9th Cir. 2001), *cert. denied, Goldberg v. Ellett*, 534 U.S. 1127, 122 S.Ct. 1064, 151 L.Ed.2d 968 (2002); *In re Kahl*, 240 B.R. 524 (Bankr. E.D. Pa. 1999) (case dismissed without prejudice to afford debtor opportunity to invoke the *Young* doctrine if relevant); *In re Schmitt*, 220 B.R. 68 (Bankr. W.D. Mo. 1998)(student loan hardship dischargeability may proceed against official of state college); *In re Morrell*, 218 B.R. 87 (Bankr. C.D. Cal. 1997) (granting debtors leave to amend in state franchise tax case to invoke *Young*).

Regardless of the outcome of the abrogation issue in this case, *Amicus* urges this Court to broadly reaffirm the use of the *Young* doctrine generally in bankruptcy cases and specifically in proceedings brought to enforce the right to a student loan discharge under § 523(a)(8).

[25] In the bankruptcy court, filing such a proceeding does not even require an additional filing fee for a debtor. *See* Federal Judicial Conference Schedule of Bankruptcy Fees, Bankruptcy Court Miscellaneous Fee Schedule, *reprinted in* 1 *Collier on Bankruptcy* Ch. App. 9 (15th ed. rev.); Fed. R. Bankr. P. 4007(b).

CONCLUSION

For all the foregoing reasons, this Court should affirm the decision below of the Sixth Circuit.

Respectfully submitted,

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